

Chen v. Gonzales
03-74343/04-71604

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RYMER, Circuit Judge, dissenting:

I would deny the petition because the BIA's determination that insertion of an IUD does not constitute political persecution is not an unreasonable construction of 8 U.S.C. § 1101(a)(42)(B). That section on its face applies only to forced abortions and involuntary sterilizations. An IUD is neither. Nor was the mild pressure that Chen testified her mother was subjected to of the sort that persecution is made of. *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004), does not compel a contrary conclusion because there the petitioner actively opposed China's family policy while in China – which Chen did not – and was forced to undergo an offensive examination in retaliation for her political opinion – which did not happen to Chen. She voluntarily went to the hospital and chose her IUD.

I disagree with the majority that the BIA improperly ignored Chen's "new medical symptoms" and evidence of physical pain caused when the IUD shifted position years after insertion. While her discomfort was unfortunate, the issue before the BIA on reopening was not merely whether Chen experienced or feared pain, but whether she feared persecution *on account of a protected ground*. Chen's medical evidence does not bear on that issue, and so was immaterial to the BIA's

determination. While Chen's IUD has now been removed, reinsertion (which she fears might happen were she returned to China) would still not be *political* persecution. Also, the majority's surmise that Chen would resist insertion of a new IUD, or that such resistance would subject her to "additional penalties," is speculation as there is no support for either possibility in the record. Neither is there anything else in the record to support, let alone require, reopening, for the only other submissions were an expert statement and articles that were not newly discovered. Accordingly, the BIA did not abuse its discretion in refusing to reopen.